80-1385
No.

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IN THE

United States Supreme Court

October Term, 1981

INDUSTRIAL CONTRACTORS, INC., MUNICIPAL ENGINEERING AND CONSTRUCTION CORP., and EVANSVILLE CONTRACTORS ASSOCIATION, INC.,

Petitioners (Defendants-Appellants below)

-vs-

CHAUFFEURS, TEAMSTERS AND HELPERS LOCAL UNION NO. 215, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America,

Respondent (Plaintiff-Appellees below)

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND APPENDIX A AND B

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QUESTIONS PRESENTED

1. Whether the Courts below erroneously and unconstitutionally reviewed the record in the instant case by refusing to consider, in determining whether or not certain grievances were arbitrable, the entire contract in question and the practice and bargaining history when to so refuse brings into issue a conflict between and among the Courts of Appeals on such issues and, in any event, would be contrary to the plain meaning of Section 301 of the National Labor Relations Act, 29 U.S.C. 185 and decisions of this Court.

2. Whether the Courts below erroniously and unconstitutionally reviewed the record in the instant case in that they held Contractors must arbitrate matters not granted through collective bargaining, thereby failing to follow the public policy set out in Section 8(d), 29 U.S.C. 158(d) of the National Labor Relations Act to the effect that no party involved in the bargaining process can be required to made a concession absent its agreement to do so.

INDEX

	Page
OPINIONS BELOW	2
JURISDICTION	2
QUESTIONS PRESENTED	2-3
CONSTITUTIONAL PROVISION AND STATUTE INVOLVED	3-4
STATEMENT	4-9
REASONS FOR GRANTING THE WRIT	9-12
1. Whether the Courts below erroniously and unconstitutionally reviewed the record in the instant case by refusing to consider, in determining whether or not certain grievances were arbitrable, the entire contract in question and the practice and bargaining history when to so refuse brings into issue a conflict between and among the Courts of Appeals on such issue and in any event would be contrary to the plain meaning of Section 301 of the National Labor Relations Act, 29 U.S.C. 185 and decisions of this Court.	9-11
2. Whether the Courts below erroniously and unconstitutionally reviewed the record in the instant case in that they held Contractors must arbitrate matters not granted through collective bargaining, thereby failing to follow the public policy set forth in Section 8 (d), 29 U.S.C. 185 (d), of the National Labor Relations Act, to the effect that no party involved in the bargaining process can be required to make a concession absent agreement to do so.	11-12

INDEX (continued)

Page

CONCLUSION 12

APPENDIX A 1A-14A

APPENDIX B 15A-31A

CASES CITED

California Trucking Assn. v. Corcram, 74 F.R.D. 534 (D.C.N.D. Cal. 1977) 10

C.W.A. v. Pacific Northwest Tel. Co., 337 F. 2d 455 (CA-9 1964) 10

C.W.A. v. Southwestern Bell Tel. Co., 415 F. 2d 35 (CA-5 1969) 10

Ind. Pet Workers v. American Oil Co., 324 F. 2d 903 (CA-7 1963) 11

I.B.E.W. v. Control Products Co., 330 F. Supp. 250 (D.C. Pa. 1968) 10

Lewis v. Benedict Coal Corp., 361 U.S. 459 (1960) 10

Local 13, Intern. Fed. of P. & T. Eng. v. General Elec. Co., 531 F. 2d 1178 (CA-5 1977) 10

N.L.R.B. v. Burns Intern. Det. Sec. Services, Inc., 406 U.S. 272 (1972) 12

CASES CITED (continued)

N.L.R.B. v. Wooster Div. of Borg Warner Corp., 356 U.S. 342 (1958) 12

U.S.W. v. Enterprise Wheel and Car Corp., 363 U.S. 593 (1960) 10

CONSTITUTIONAL PROVISION AND STATUTE

Fifth Amendment, Constitution of the United States 3

28 U.S.C. 1254 (1) 2

29 U.S.C. 158 (d) 3, 11

29 U.S.C. 185 ..... 3, 4, 10

29 U.S.C. 1337 4

IN THE

SUPREME COURT OF THE UNITED STATES

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No.

INDUSTRIAL CONTRACTORS, INC., MUNICIPAL ENGINEERING AND CONSTRUCTION CORP., and EVANSVILLE CONTRACTORS ASSOCIATION, INC.,

Petitioners (Defendants-Appellants below)

-vs-

CHAUFFEURS, TEAMSTERS AND HELPERS LOCAL UNION NO. 215, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America,

Respondent (Plaintiff-Appellees below)

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The Petitioners, Industrial Contractors, Inc., Municipal Engineering and Construction Corp., and Evansville Contractors Association, Inc., (hereafter "Contractors") respectfully ask that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on November 17, 1980.

OPINIONS BELOW

The Opinion and Judgment of the Court of Appeals is, pursuant to Court Rule, in the form of an "Unpublished Order Not to be Cited" and, thus, is set forth in full in Appendix A at pages 1 through 5. Similarly, the Memorandum of Decision of the United States District Court for the Southern District of Indiana, Evansville Division, Judgment Entry and Entry Overruling Motion to Vacate Earlier Judgment are also set forth in Appendix A at pages 6 through 10.

JURISDICTION

The Judgment of the Court of Appeals was entered on November 17, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and on the grounds that the Opinion and Judgment of the Court of Appeals violates petitioners' right to due process of law under the Fifth Amendment in that it was denied judicial review of this matter, as more fully discussed in the "Reasons for Granting the Writ" portion of this Petition.

QUESTIONS PRESENTED

1. Whether the Courts below erroneously and unconstitutionally reviewed the record in the instant case by refusing to consider, in determining whether or not certain grievances were arbitrable, the entire contract in question and the practice

and bargaining history when to so refuse brings into issue a conflict between and among the Courts of Appeals on such issues and, in any event, would be contrary to the plain meaning of Section 301 of the National Labor Relations Act, 29 U.S.C. 185 and decisions of this Court.

2. Whether the Courts below erroniously and unconstitutionally reviewed the record in the instant case in that they held Contractors must arbitrate matters not granted through collective bargaining, thereby failing to follow the public policy set out in Section 8(d), 29 U.S.C. 158(d) of the National Labor Relations Act to the effect that no party involved in the bargaining process can be required to made a concession absent its agreement to do so.

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The pertinent constitutional provision involved is as follows:

> ". . . nor shall any person . . . be deprived of life, liberty or property, without due process of law; . . ."

The statute involved is the National Labor Relations Act, as amended, and more specifically, Section 8(d) (29 U.S.C. 158 (d)) and Section 301 (29 U.S.C. 185) which in relevant part provides as follows:

> "For the purpose of this section is the performance of the mutual obligation . . ., but such obligation does not compel either party to agree to a proposal or require the making of a concession."

* * * *

> "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount of controversy or without regard to the citizenship of the parties."

STATEMENT

Note: The entire record in this matter consists of only 51 pages *in toto* and is currently in the custody of the Clerk of the Courts, United States District Court for the Southern District of Indiana, Evansville Division, U.S. Courthouse and Federal Building 101 Northwest 7th Street, Evansville, Indiana 47708. Because of this, all of the evidence as such in this matter is set forth in Appendix B with the exception of Exhibit A attached to the complaint which is the collective bargaining agreement involved. In this Statement, however, this agreement is referred to by specific citation to the article, section and page numbers of this exhibit or as appearing in the Order of the Court of Appeals.

This case was brought by Chauffeurs, Teamsters and Helpers Local Union No. 215, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (hereafter "Local 215") by petition for an order compelling arbitration. The action was brought pursuant to federal statute under 28 U.S.C. 1337 and 29 U.S.C. 185. Thereafter, Contractors and Local 215 filed motions for summary judgment. The District Court entered a Memorandum of Decision and Judgment for Local 215 after which Contractors filed a motion to vacate, set aside or reconsider Memorandum

of Decision and Judgment which the District Court overruled. (Transcript of Record, pages 11-14) Thereafter Contractors appealed to the United States Court of Appeals for the Seventh Circuit and that Court entered its Order and Judgment on November 17, 1980 affirming the Judgment of the District Court. (Appendix A, pages 1 - 5)

This case began on September 12, 1978 when Local 215 filed four grievances against contractors. (Exhibits B through E attached to the Petition filed by Local 215, Transcript of Record pages 6-9, Appendix B, pages 1-4) The first of these states that an employee "was observed hauling buckets and tools" from an Industrial Yard and asks for relief that this work "be assigned to a Teamster and that the Teamster be paid eight (8) hours work at $9.60 per hour." (Exhibit B attached to the Petition filed by Local 215, Transcript of the Record page 6, Appendix B, page 1) The second grievance states that a "Laborer was observed driving his own truck" to a job site and asked for relief that this work "be assigned to a Teamster" and monetary relief be granted. (Exhibit C attached to the Petition filed by Local 215, Transcript of the Record, page 7, Appendix B, page 2) The third states that an employee was "observed picking up parts" and, similarly, that this was work that should be assigned to a Local 215 member and monetary relief granted. (Exhibit D attached to the Petition filed by Local 215, Transcript of the Record, page 8, Appendix B, page 3) The fourth grievance states that the drivers of two pickup trucks were not Teamsters and the work performed should have been assigned to Local 215 members, and because it was not so assigned, monetary relief should also be granted. (Exhibit E attached to the Petition filed by Local 215, Transcript of the Record, page 9, Appendix B, page 4) Contractors have refused to arbitrate any of these grievances.

The collective bargaining agreement between Contractors and Local 215, relevant to the issues involved in this Petition and in addition to those noted by the Court of Appeals (Appendix A, page 2) contains the following language:

"The jurisdiction of work referred to in the Wage Classification and elsewhere in this contract is the jurisdiction of work claimed by the Teamsters Local Union No. 215 and in the event a jurisdictional dispute arises, nothing contained herein shall make it mandatory for the Employer to accept the claims of jurisdiction as binding upon him. The Employer does not waive any of his rights by permitting the inclusion of the jurisdiction or work in this contract. This paragraph is in no way intended to interfere with work that has definitely been established to be the work of this trade and is merely inserted to protect the Employer when two (2) or more trades are claiming the same work." (Exhibit A attached to the Petition filed by Local 215, Transcript of the Record, Exhibit A, Article VIII, Section 3, page 9)

* * * *

"This Agreement covers the entire understanding between the parties hereto. No oral or written rule, regulation or understanding not incorporated herein will be of any force of effect upon any party hereto." (Exhibit A attached to the Petition filed by Local 215, Transcript of the Record, Exhibit A, Article XV, Section 1, page 30)

In responding to Local 215's Petition for an Order Compelling Arbitration, Contractors filed a Motion for Summary Judgment and attached to this Motion were three affidavits which, in substance, are as follows:

> 1. *Affidavit of Alan Braun*: the grievances involved in this case all are related to the assignment of work to people who do not belong to Local 215. The work involved the use of pick-up trucks and this type of assignment has been made for many years and there is nothing unusual about it. In collective bargaining which led up to the agreement in issue in this case, Local 215 proposed contract language requiring that Local 215 be given exclusive work jurisdiction over hauling "men, material, or parts." This proposal was discussed during bargaining and was rejected by Contractors and did not end up in the current agreement. For many years, Local 215 has attempted to take over all truck driving, but without success." (Exhibit A, attached to Contractors' Motion for Summary Judgment, Transcript of the Record, pages 22-23, Appendix B, page 5-6)
>
> 2. *Affidavit of John Hamsley*: One of the grievances involved using members of the Plumbers Union to haul tools and materials and this has been done for many years. As a member of the bargaining committee involved in negotiating the agreement in issue in this case, he is

familiar with the proposal, made by Local 215 that it be given exclusive work jurisdiction over truck driving, which was rejected during the bargaining. Further, this has been an objective of Local 215 for many years, the objective has not been achieved. (Exhibit B, attached to Contractors' Motion for Summary Judgment, Transcript of the Record, pages 24-25, Appendix B, pages 7-8)

3. *Affidavit of Randolph Walther*: For many years Local 215 has taken the position in negotiations that all truck driving of any kind should be performed by its members. This position has been unsuccessful. Contractors for many years had been involved in jurisdictional disputes, but currently the method of settling such disputes is through the NLRB. Local 215's claim to all truck driving was recently defeated in the District Court in Civil No. 78-148-C in which its claim to such work performed by the Glazers Union membership was enjoined. Currently, Contractors and Local 215 are engaged in bargaining for a new agreement and Local 215 has made the following proposal:

> "Section 24. Teamsters will drive pickups to, from and on the job site and will haul all men, materials, tools and equipment to, from and on the job site. Teamsters will chase parts."

> The above proposal has been rejected by Contractors. (Exhibit C, attached to Contractors' Motion for Summary Judgment, Transcript of the Record, pages 26-28, Appendix B, pages 9-11)

Thereafter, Local 215 filed its Motion for Summary Judgment and attached to this Motion was an affidavit which, in substance, is as follows:

> 1. *Affidavit of Kenneth Skaggs*: After citing those portions of the Agreement set out in the Order of the Court of Appeals (Appendix A, page 2), this affidavit concludes as follows: "The Evansville Contractors Association and its members have resolved similar grievances in the past, under the present agreement, in favor of the grievant." (Exhibit A, attached to Local 215's Motion for Summary Judgment, Transcript of the Record, pages 34-35, Appendix B, pages 12-13)

REASONS FOR GRANTING THE WRIT

1.

WHETHER THE COURTS BELOW ERRONIOUSLY AND UNCONSTITUTIONALLY REVIEWED THE RECORD IN THE INSTANT CASE BY REFUSING TO CONSIDER, IN DETERMINING WHETHER OR NOT CERTAIN GRIEVANCES WERE ARBITRABLE, THE ENTIRE CONTRACT IN QUESTION AND THE PRACTICE AND BARGAINING HISTORY

WHEN TO SO REFUSE BRINGS INTO ISSUE A CONFLICT BETWEEN AND AMONG THE COURTS OF APPEALS ON SUCH ISSUE AND, IN ANY EVENT, WOULD BE CONTRARY TO THE PLAIN MEANING OF SECTION 301 OF THE NATIONAL LABOR RELATIONS ACT, 29 U.S.C. 185 AND DECISIONS OF THIS COURT.

As the above states, the opinions of the Court of Appeals and the District Court simply ignore the entire record in this case as it relates to bargaining history and what was agreed to by Con tractors and Local 215 as a result of this bargaining. This point of view was not held by the courts below at one time and there is a conflict between and among the Courts of Appeals on such issues: See the discussions of this conflict in *C.W.A. v. Pacific Northwest Bell Tel. Co.*, 337 F. 2d 455, 458 note 2 (CA-9 1964) and *C.W.A. v. Southwestern Bell Tel. Co*, 415 F. 2d 35, 40 at note 10 (CA-5 1969)

Similarly, as observed by this Court: "In our role of developing a meaningful body of labor law . . . we think special heed should be given to the context in which the collective bargaining agreements are negotiated and the purposes for which they are intended to serve." *Lewis v. Benedict Coal Corp.*, 361 U.S. 459, 468 (1960) Which means in effect, and from Contractors' point of view, that the federal courts when confronted with a matter involving a request for entry of an order requiring arbitration must not resort to a wooden application of the rule favoring arbitration stated by this Court in the so-called Trilogy Cases - - chief among them being *U.S.W. v. Enterprise Wheel and Car Corp.*, 363 U.S. 593 (1960). Rather, this rule must have some limits, although this Court has not clearly stated them. For other discussions of such problems which in a sense place the federal courts in a *penumbra* area as to what to consider in deciding such matters see: *Local 13, Intern. Fed. of P. & T. Eng. v. General Elec. Co.*, 531 F. 2d 1178, 1183 note 13 (CA-5 1977); *California Trucking Assn. v. Corcram*, 74 F.R.D. 534, 542 (D.C. N.D. Cal 1977); *I.B.E.W.*

v. Control Products Co., 330 F. Supp. 250 (D.C. Pa. 1968)

2.

WHETHER THE COURT BELOW ERRONIOUSLY AND UNCONSTITUTIONALLY REVIEWED THE RECORD IN THE INSTANT CASE IN THAT THEY HELD CONTRACTORS MUST ARBITRATE MATTERS NOT GRANTED THROUGH COLLECTIVE BARGAINING THEREBY FAILING TO FOLLOW THE PUBLIC POLICY SET OUT IN SECTION 8(d), 29 U.S.C. 158(d) of the National Labor Relations Act TO THE EFFECT THAT NO PARTY INVOLVED IN THE BARGAINING PROCESS CAN BE REQUIRED TO MAKE A CONCESSION ABSENT ITS AGREEMENT TO DO SO.

Although totally ignored by the Courts below, the record in this Case very clearly shows that Local 215 is, to paraphrase an accepted cliche in the field of labor law, "trying to obtain through arbitration what it did not get at the bargaining table." The basis for this assumption which as a matter of policy is assumed in the bargaining process is contained in Section 8 (d) of the National Labor Relations Act, 29 U.S.C. 158(d) which states that the obligation to bargain collectively "does not compel either party (to the process) to agree to a proposal or require the making of a concession." In fact, it was the belief of Contractors that this was the position of the Court of Appeals below as taken in *Ind. Pet. Workers v. American Oil Co.*, 324 F. 2d 903, 907 (CA-7 1963) affd. 379 U.S. 130 (1964) and cited in this respect in *Local 13, Fed. of P. & T. Eng. v. General Elec. Co.*, 531 F. 2d 1178, 1183 note 13 (CA-5 1977). In sum, from Contractors' point of view, Local 215 wants to capture work through arbitration and, in effect, get what it gave up in bargaining, all contrary

to case and statutory law. *N.L.R.B. v. Burns Intern. Sec. Services, Inc.*, 406 U.S. 272 (1972); *N.L.R.B. v. Wooster Div. of Borg Warner Corp.*, 356 U.S. 342 (1958).

CONCLUSION

For these reasons, a writ of certiorari should issue to review the order and judgment of the Court of Appeals for the Seventh Circuit, or in the alternative be remanded with directions to set aside the Judgment and direct the Court to deny the relief requested in the original Petition filed herein.

Respectfully submitted,

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Unpublished Order
Not to be Cited
Per Circuit Rule 35

APPENDIX A

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604
Submitted: November 5, 1980

November 17, 1980

Before
Hon. Luther M. Swygert, Circuit Judge
Hon. Wilbur F. Pell, Jr., Circuit Judge
Hon. Harlington Wood, Jr., Circuit Judge

CHAUFFEURS, TEAMSTERS AND HELPERS LOCAL UNION NO. 215, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Plaintiff-Appellee,	) Appeal from the United States District Court for the Southern District of Indiana, Evansville Division.
No. 79-1489 vs.	)
INDUSTRIAL CONTRACTORS, INC., MUNICIPAL ENGINEERING AND CONSTRUCTION CORP., and EVANSVILLE CONTRACTORS ASSOCIATION, INC., Defendants-Appellants.	) No. EV 79-C-21 S. Hugh Dillin, Judge.

Order

I.

Defendants-appellants, Industrial Contractor, Inc., Muncipal Engineering and Construction Corp., and Evansville Contractors Association, Inc., (hereinafter Contractors) appeal from a judgment of the district court which ordered Contractors to arbitrate various grievances filed by the plaintiff-appellee (hereinafter Union).

The Union filed four grievances against Contractors alleging violations of the collective bargaining agreement. Contractors refused to arbitrate the grievances and the Union then brought an action in the district court for an order compelling Contractors to arbitrate. The district court ordered Contractors to arbitrate the grievances at issue.

Relevant portions of the collective bargaining agreement provide as follows:

> If any controversy, dispute or grievance arises with respect to the interpretation, application or enforcement of any of the provisions of this Agreement, the same shall be submitted [to the grievance procedure].

The grievances in the present case concern work assignments which were given to non-Union members. On the subject of work assignments the collective bargaining agreement provides:

> *Article VIII, Section 1*:
>
> . . . Drivers of Pickup Trucks when hauling equipment, supplies and materials to, from and on the job site, except when used by a superintendent or a foreman for his own transportation or for the use of a mechanic for the transportation of himself, his tools and repair parts.

Article VIII, Section 3:

The Employer agrees to respect the jurisdiction of the Union and shall not direct or require employees or persons other than those listed in Article VIII, Section 1, to perform work which is recognized as the work of the employees in said unit. It is agreed that the provisions of this Article shall be applied in compliance with existing laws.

Article VI, Section 22:

The Employer agrees to the jurisdiction of work assigned and/or generally covered by the Teamsters (Local 215) in this geographical area.

II.

Both the statutory framework and interpreting case law recognize the salutary purpose of an arbitration scheme. *See* 29 U.S.C. § 173 (d), *United Steelworkers of America v. American Manufacturing Co.*, 363 U.S. 564 (1960); *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers of America v. Enterprise Wheel and Car Corp.*, 363 U.S. 593 (1960).

Recognizing the significance of arbitration in labor-management relations, courts have defined the limited review in determining whether a matter is subject to arbitration. In *International Union of Operating Engineers, Local Union No. 139 v. Carl A. Morse, Inc.*, 529 F.2d 574 (7th Cir. 1976), we set forth the proper analysis in deciding whether a matter should be submitted to arbitration. First, is there a valid agreement to arbitrate, and second, does the agreement cover the asserted dispute?

In the present case there is a valid agreement to arbitrate. As noted above, the collective bargaining agreement provides

for the arbitration of "any controversy, dispute or grievance. . . ." Contractors proffer no argument in challenging whether a valid agreement to arbitrate exists.

The second inquiry is whether the arbitration clause covers the particular grievance at issue. Initially, we note the general presumption of arbitration. *See Gateway Coal Co. v. United Mine Workers*, 414 U.S. 368 (1974).

> An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.

Id. at 377-78 (quoting *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960).

The arbitration provision in the present case is broad in its language, referring to "any . . . grievance." *See* 529 F.2d at 579. Indeed, the arbitration clause in the present case is much broader in scope than at issue in *United Steelworkers of America v. Warrior & Gulf Navigation Co.*

Also, we note that the particular disputes at issue - - work assignments - - are explicitly covered by the collective bargaining agreement and the disputes concern the interpretation of these provisions. This explicit reference to work assignments in the agreement, in conjunction with the broad arbitration clause convince us that the arbitration clause covers the asserted dispute.

Contractors make several arguments in their brief. However, most of these matters go toward an interpretation of the agreement and the underlying dispute rather than the scope of the arbitration clause. These matters, of course, properly are left for resolution by the arbitrator. 529 F.2d at 580. *See also Pietro Scalzitti Company v. Operating Engineers, Local 150*, 351 F.2d 576 (7th Cir. 1965) (merits of dispute to be decided by arbitrator).

Likewise, the cases Contractors rely upon in their arguments are all distinguishable. *International Union U.A.W., Local 391 v. Western Electric Co.*, 299 F.2d 195 (7th Cir. 1962) did not concern arbitration or the scope of an arbitration clause, but rather an employer's right to contract out.[1]

Contractors rely on *Century Electric Motor Company v. N.L.R.B.*, 447 F.2d 10 (8th Cir. 1971) and the existence of a "zipper clause" in the contract. However, in *Century Electric* there was no express language governing the practice at issue. As noted above, the collective bargaining agreement in this case expressly deals with work assignments.

The judgment of the district court is affirmed and the motion under Circuit Rule 15, of course, granted.

1 Contractors' reliance on *N.L.R.B. v. Jacobs Mfg. Co.*, 196 F.2d 180 (2d Cir. 1952); *N.L.R.B. v. Wooster Division of Borg-Warner Corp.*, 356 U.S. 342 (1958); *N.L.R.B. v. Burns International Security Services, Inc.*, 406 U.S. 272 (1972) is misplaced. *Jacobs* and *Borg-Warner* concerned the employer's duty to bargain. *Burns* concerned the obligation of a successor employer to bargain collectively.

Also, *Teledyne Wisconsin Motor v. Local 283, United Automobile, Aerospace, and Agricultural Implement Workers of America, UAW*, 530 F.2d 727 (7th Cir. 1976) is distinguishable. In *Teledyne* the arbitration clause was an "employee-oriented permissive arbitration clause." 530 F.2d at 732.

Nov 22 1980

Unpublished Per Curiam Order

JUDGMENT – WITHOUT ORAL ARGUMENT

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

November 17, 1980

Before
Hon. Luther M. Swygert, Circuit Judge
Hon. Wilbur F. Pell, Jr., Circuit Judge
Hon. Harlington Wood, Jr., Circuit Judge

CHAUFFEURS, TEAMSTERS AND HELPERS LOCAL UNION NO. 215, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Plaintiff-Appellee,	) Appeal from the) United States District Court for the) Southern District) of Indiana, Evansville Division.
No. 79-1489 vs.	) No. EV 79-C-21
INDUSTRIAL CONTRACTORS, INC., MUNICIPAL ENGINEERING AND CONSTRUCTION CORP., and EVANSVILLE CONTRACTORS ASSOCIATION, INC., Defendants-Appellants.	) Judge S. Hugh Dillin

This cause came before the Court for decision on the record from the United States District Court for the Southern District of Indiana, Evansville Division.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, with costs, in accordance with the order of this court entered this date.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
EVANSVILLE DIVISION

CHAUFFEURS, TEAMSTERS AND HELPERS LOCAL UNION NO. 215 a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Plaintiff,	)	
-vs-	)	NO. EV 79-21-C
INDUSTRIAL CONTRACTORS, INC., MUNICIPAL ENGINEERING AND CONSTRUCTION CORP., EVANSVILLE CONTRACTORS ASSOCIATION, INC., Defendants.	)	

MEMORANDUM OF DECISION

This matter is before the Court on the petition of the plaintiff for an order compelling defendants to arbitrate a series of grievances filed by the business representative of the local union, the answer of defendants, and cross-motions of the parties for summary judgment. The Court has jurisdiction of the action. 29 U.S.C. §185; 28 U.S.C. §1337; 9 U.S.C. §4.

It is settled national labor policy that Courts have a narrow view in suits seeking to compel arbitration. Two inquiries are relevant in the determination. Is there a valid agreement to arbitrate? Does the agreement cover the asserted dispute? Intern. U. of Operating Engineers Local 139 v. Morse, 529 F.2d 574 (7 Cir. 1976). See also, *Steelworkers* trilogy, 363 U.S. 564, 363 U.S. 574, 363 U.S. 593 (1960).

The first condition is not in dispute. The defendants have not raised the question of the agreement's validity. The defendants assert that the matters in dispute are not covered by the agreement. The grievances concern the operation of trucks by nonunion workers at a union job site. The issue, therefore, is whether or not the operation of trucks by non-union workers at a union job site is a matter covered by the collective bargaining agreement. The Court finds that the dispute is arguably within the agreement, and therefore, orders the defendants to arbitrate the grievances.

Article VIII, Section 1, of the agreement provides for the classification of various jobs within the agreement. One such classification is as follows:

> "Drivers of Pickup Trucks when hauling equipment, supplies and materials to, from and on the job site, except when used by a superintendent or a foreman for his own transportation or for the use of a mechanic for the transportation of himself, his tools and repair parts."

When considered with Section 1, Section 3 of the same Article appears to address matters raised by the grievances. Section 3 provides the following:

> "The Employer agrees to respect the jurisdiction of the Union and shall not direct or require employees or persons other than those listed in Article VIII, Section 1, to perform work which is recognized as the work of the employees in said unit. It is agreed that the provisions of this Article shall be applied in compliance with existing laws."

The Court finds that the agreement to arbitrate any controversies, disputes or grievances arising with respect to the interpretation of the agreement, does include the instant disputes, and an order will be entered in accordance with

this opinion.

Dated this 23rd day of February, 1979; filed March 2, 1979.

S/ S. Hugh Dillin, Judge

Copies to:

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March 3 1979

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
EVANSVILLE DIVISION

CHAUFFEURS, TEAMSTERS AND HELPERS LOCAL UNION NO. 215, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America,	)	
Plaintiff,	)	
-vs-	)	NO. EV 79-21-C
INDUSTRIAL CONTRACTORS, INC., MUNICIPAL ENGINEERING AND CONSTRUCTION CORP., EVANSVILLE CONTRACTORS ASSOCIATION, INC.,	)	
Defendants.	)	

JUDGMENT

The Court having this day filed its Memorandum of Decision, reading as follows: (H. I.), now in accordance therewith,

IT IS CONSIDERED, ORDERED AND DECREED that the defendants submit to arbitration of the grievances described in plaintiff's complaint, according to Article XI of the collective bargaining agreement between the parties.

IT IS FURTHER CONSIDERED AND ADJUDGED that plaintiff recover its costs herein.

Dated this 2nd day of March, 1979.

S/ S. Hugh Dillin, Judge

Copies to:

Ann Cavanaugh Thomas, 825 Walnut St., Evansville, IN 47713

Joseph A. Yocum, 806 Hulman Bldg., Evansville, IN 47708

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
EVANSVILLE DIVISION

CHAUFFEURS, TEAMSTERS AND HELPERS LOCAL UNION NO. 215 a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Plaintiff,	)	
-vs-	)	NO. EV 79-21-C
INDUSTRIAL CONTRACTORS, INC., MUNICIPAL ENGINEERING AND CONSTRUCTION CORP., EVANSVILLE CONTRACTORS ASSOCIATION, INC., Defendants.	)	

ENTRY

This matter is before the Court on the motion of the defendants to vacate an earlier judgment entered in this cause. The motion is overruled.

Discussion

The defendants allege that the Court misperceived the relevant facts necessary to adjudicate plaintiff's motion to compel arbitration. The Court was perhaps overbroad in its characterization of certain workers at the troubled job site as being "nonunion." In retrospect, the Court believes "non-members of Chauffeurs, Teamsters and Helpers Local Union No. 215" is more accurate, and therefore, adopts that characteri-

zation to describe the subject workers.

Having corrected the problem associated with semantics, the substantive issue remains intact. The plaintiff alleges that nonmembers of its union are performing work, which work is under exclusive assignment to plaintiff, in violation of their collective bargaining agreement. The merits of plaintiff's claim are not at issue in this action.

The defendants' argument that what is involved is a union jurisdiction dispute is a smoke screen. It may be a fact that the workers who are allegedly performing Teamsters' work are members of some other union. That fact alone would not vest exclusive jurisdiction in the National Labor Relations Board (NLRB) because such jurisdiction does not become exclusive until a strike is called or threatened. Until such time, arbitration is an appropriate course. Operating Engineers, #139 v. Mores, 387 F.Supp. 153 (E.D.Wis. 1974), aff'd 529 F.2d 574 (7 Cir. 1976).

For the reasons expressed in this Court's judgment of March 2, 1979 and for the further reasons expressed herein, the motion of the defendants is overruled.

Dated this 3rd day of April 1979.

S/ S. Hugh Dillin, Judge

Copies to:

Ann Cavanaugh Thomas, 825 Walnut St., Evansville, IN 47713

Joseph A. Yocum, 806 Hulman Bldg., Evansville, IN 47708

APPENDIX B

OFFICIAL GRIEVANCE REPORT
Teamsters Local Union No. 215

Employee's Name: _____
Employee's Address: _____
City: _____ Phone: _____

Employer: Industrial Contractors, Inc.
Address: 401 N.W. First St.
City: Evansville, IN

Violation Alleged: (Contract) _____
(Article) 8 (Subsection) 1, 3 & 4

State Grievance: (Give Dates) Monday, September 11, 1978 at 7:36 a.m. On Monday at Industrial Yard, Mr. Don Wright was observed hauling buckets and tools from Industrial Yard. This work is in violation of the contract between the Teamsters and Evansville Contractors Association, Inc., Article 8.

We are asking that this work that Mr. Don Wright is performing be assigned to a Teamster and that that Teamster be paid eight (8) hours work at $9.60 per hour.

Date Filed: 9/12/78

Member's Signature: S/ Lewis R. Smith
Steward's Signature: _____

DISPOSITION OF CASE

_____

_____

_____

Business Representative _____

Approved _____ Date _____

White copy - Union Yellow copy - Employer
Pink copy - Employee

Exhibit "B"

OFFICIAL GRIEVANCE REPORT
Teamsters Local Union No. 215

Employee's Name: _____
Employee's Address: _____
City: _____ Phone: _____

Employer: INDUSTRIAL CONTRACTORS.
Address: 401 N.W. First St.
City: Evansville, IN

Violation Alleged: (Contract) _____
(Article) 8 (Subsection) 1, 3 & 4

State Grievance: (Give Dates) On Monday, September 11, 1978, at 11:00 a.m., a Laborer was observed driving his own truck, hauling tools, concrete forms, water can and men on the job site (Industrial Park East, 5312 Old Boonville Highway). The Laborer was asked to stop driving and let a Teamster do this work. The Laborer said he was told by Jim Sigler to do this work.

We are asking that this work be assigned to the Teamsters since it is a violation of the contract between Teamsters and Evansville Contractors Association; and we are asking that a Teamster be paid eight (8) hours at $9.60 per hour.

Date Filed: 9/12/78

Member's Signature: _____
Steward's Signature: S/ Lewis R. Smith, B.R.,

DISPOSITION OF CASE

_____

_____

_____

Business Representative _____

Approved _____ Date _____

White copy - Union Yellow copy - Employer
Pink copy - Employee

Exhibit "C"

OFFICIAL GRIEVANCE REPORT
Teamsters Local Union No. 215

Employee's Name: _____
Employee's Address: _____
City: _____ Phone: _____

Employer: Industrial Contractors
Address: 401 N. W. First St.
City: Evansville, IN

Violation Alleged: (Contract) _____
(Article) 8 (Subsection) 1, 3 & 4

State Grievance: (Give Dates) On Monday, September 11, 1978, at 12:05 p.m., Jake Pruitt, driving Truck No. 14-81, was observed picking up truck parts at Auto Wheel & Rim Service at 1212 East Morgan Avenue. This is in violation of the contract between the Teamsters and Evansville Contractors Association, Inc., Article 8.

We are asking that this work that Jake Pruitt is performing be assigned to a Teamster and that that Teamster be paid eight (8) hours work at $9.60 per hour.

Date Filed: 9/12/78

Member's Signature: _____
Steward's Signature: S/ Lewis R. Smith, B.R.,

DISPOSITION OF CASE

_____

_____

_____

Business Representative _____

Approved _____ Date _____

White copy - Union Yellow copy - Employer
Pink copy - Employee

Exhibit "D"

OFFICIAL GRIEVANCE REPORT
Teamsters Local Union No. 215

Employee's Name: _____
Employee's Address: _____
City: _____ Phone: _____

Employer: Municipal Engineering, Inc.
Address: 1157 E. Sycamore St.
City: Evansville, Indiana

Violation Alleged: (Contract) _____
(Article) _____ (Subsection) _____

State Grievance: (Give Dates) On September 12, 1978, Charles Cole, Foreman, had two pickup trucks load with material and tools, working on Warrick Works Project. The drivers on these trucks were not Teamsters.

This is a violation of the contract between Evansville Contractors Association and Teamsters 215; therefore, we are asking for two Teamsters to be paid for this work - - eight (8) hours a piece.

Date Filed: 9/12/78

Member's Signature: _____
Steward's Signature: S/ Lewis R. Smith, B.R.

DISPOSITION OF CASE

_____

_____

_____

Business Representative _____

Approved _____ **Date** _____

White copy - Union **Yellow copy - Employer**
Pink copy - Employee

Exhibit "E"

STATE OF INDIANA)
) SS: **AFFIDAVIT**
COUNTY OF VANDERBURGH)

Alan Braun, being duly sworn, deposes and says as follows:

1. I am Executive Vice-President of Industrial Contractors, Inc. a member of Evansville Contractors Association, Inc., and I make this affidavit in support of the position that the petition filed in Civil Action No. EV 79-21-C to require arbitration of certain grievances should be denied.

2. Exhibit B, C, and D annexed to the petition filed in this case involve matters relating to the operation of Industrial Contractors, Inc. All three of these grievances relate to the assignment of work involving the use of trucks by persons who do not belong to the Teamsters Union. Exhibit B involves the use of a pick-up truck by a Concrete Finisher to haul his tools from our yard to a job site. This has been done by employees of this company for many years and there is nothing unusual about this procedure. Exhibit C involves the use of a Laborer driving a pick-up truck on a job site. Once again, this has been done by employees of this company for many years and there is nothing unusual about this procedure. Exhibit D involves the use of a Plumber driving a pick-up truck to get some parts. Similarly, this has been done by employees of this company for many years and there is nothing unusual about this procedure.

3. I was on the bargaining committee that negotiated Exhibit A attached to the petition filed in this case, and during these negotiations the Teamsters Union made the following proposal:

> "The Employer recognizes the jurisdiction of the Teamsters and will not permit any of his employees to haul men, material or parts nor will

he permit his employees to use any equipment to haul men, material or parts unless it is a Teamster."

This proposal was discussed and rejected by the bargaining committee and it did not end up in Exhibit A attached to the petition. The basis for our rejection of this proposal is simply the fact that much truck driving in the area covered by Exhibit A attached to the petition has and is being done by employees other than members of the Teamsters Union. If we had granted this demand it would have been impossible for us to allow these persons to operate trucks, yet it is traditional that such work is performed by employees other than Teamsters. Such matters were fully discussed during negotiations and for many years the Teamsters have attempted to take over all forms of truck driving of any kind in the area covered by Exhibit A and this take over has not been successful either in the field or in contract negotiations.

Further affiant sayeth not.

S/ Alan Braun

Subscribed and sworn to before me a notary public this 16th of February, 1979.

S/ Mona A. Perry
Notary Public,
who resides in Vanderburgh County, Indiana

My Commission Expires:
August 26, 1979

STATE OF INDIANA)
) SS: AFFIDAVIT
COUNTY OF VANDERBURGH)

John Hamsley, being duly sworn, deposes and says as follows:

1. I am Secretary Treasurer of Municipal Engineering and Construction Corp., and I make this affidavit in support of the position that the petition filed in Civil Action No. EV 79-21-C to require arbitration of certain grievances should be denied.

2. Exhibit E attached to the petition filed in this case involves matters relating to the operation of Municipal Engineering And Construction Corp. This grievances relates to the assignment of work involving the use of trucks by persons who do not belong to the Teamsters Union. Exhibit E involves the use of pick-up trucks by members of the Plumbers Union to haul their tools and materials around. This has been done by employees of this company for many years and there is nothing unusual about this procedure.

3. I was on the bargaining committee that negotiated Exhibit A attached to the petition filed in this case, and during negotiations the Teamsters Union made the following proposal:

> "The Employer recognizes the jurisdiction of the Teamsters and will not permit any of his employees to haul men, material or parts nor will he permit his employees to use any equipment to haul men, material or parts unless it is a Teamster.

This proposal was discussed and rejected by the bargaining committee and it did not end up in Exhibit A attached to the petition. The basis for our rejection of this proposal is simply the fact that much truck driving in the area covered by Exhibit

A attached to the petition has and is being done by employees other than members of the Teamsters Union. If we had granted this demand it would have been impossible for us to allow these persons to operate trucks, yet is it tradition that such work is performed by employees other than Teamsters. Such matters were fully discussed during negotiations and for many years the Teamsters have attempted to take over all forms of truck driving of any kind in the area covered by Exhibit A and this take over has not been successful either in the field or in contract negotiations.

Further affiant sayeth not.

S/ John Hamsley

Subscribed and sworn to before me a notary public this 16th day of February, 1979.

S/ Carole Cook
Notary Public, who resides in Vanderburgh County, IN

My Commission Expires:

3-7-81

STATE OF INDIANA)
) SS: **AFFIDAVIT**
COUNTY OF VANDERBURGH)

Randolph Walther, being duly sworn, deposes and says as follows:

1. I am Executive Director of Evansville Contractors Association Inc. and I make this affidavit in support of the position that the petition filed in Civil Action No. EV 79-21-C to require arbitration of certain grievances should be denied.

2. As Executive Director of Evansville Contractors Association, Inc. I take a very active role in the negotiation of all collective bargaining agreements entered into by the Association with 11 building trades unions and one of these is Teamsters Local 215, the petitioner in this case. For many years the Teamsters, in negotiations, have unsuccessfully taken the position that all truck driving of any kind should be done by members of their union. As the affidavits of Alan Braun and John Hamsley show, this position has been consistently rejected by the Association because of the fact that much truck driving in this area is done by many employees of member contractors of the Association who are not members of the Teamsters Union.

3. For many years the Association has dealt with conflicts of jurisdiction over who drives trucks and performs the duties of various kinds engaged in on any construction project. For at least six years now it has been the Association's position that all disputes over who does certain work should be decided by the National Labor Relations Board under the procedures of the NLRA established for such purposes. Years ago, the Association was bound by the so-called National Joint Board for the Settlement of Jurisdictional disputes. But, after much litigation, none of contracts bind us to any agency other than the NLRB.

4. It has long been the position of the Teamsters that all truck driving of any kind should be done by them and as recently as

last fall this Court in Civil No. EV 78-148-C granted a Temporary Injunction restraining the Teamsters from attempting to stop employees of Central Class Co. of Indiana, Inc. who were and are members of Glaziers Union Local 1385, from driving trucks. It is custom in the area covered by Exhibit A attached to the petition filed in this case that persons other than members of the Teamsters drive trucks. The reason for this is that in the construction industry the nature of the work involves movement of men, supplies, tools and materials. Even top supervision drives pick up trucks all over most job sites, as well as to and from job sites.

5. Currently, the Association is attempting to negotiate a new collective bargaining agreement with the Teamsters and, once again, they have made the following proposals:

> "*Section 24.* Teamsters will drive pickups to, from and on the job site and will haul all men, materials, tools and equipment to, from and on the job site. Teamsters will chase parts.
>
> *Section 25.* All handloading and unloading by hand of material at the warehouse or store area is the work of the Teamsters.
>
> *Section 26.* The transportation of all material to the point of use on the job site is the work of the Teamsters.
>
> *Section 27.* The use of a cherry picker for hauling material in skip boxes is prohibited." (Teamsters proposal 1979 negotiations, page 5)

All of these proposals have been rejected by the Association during the negotiations and these proposals are just another version of the work claimed in the grievances attached to the

petition as Exhibits B, C, and D and, also, of the proposal made by the Teamsters during the 1976 negotiations and set out in the affidavits of Alan Braun and John Hamsley. Also, during current negotiations the Teamsters have proposed the following: "Employer agrees to be bound by the resolution of jurisdictional disputes by the International Unions." Similarly, this proposal has been rejected, but it does show, as stated above in this affidavit, that the Association for at least six years now has relied on the N.L.R.B. for the resolution of disputes over work assignments if for no other reason that the fact that this proposal wouldn't make much sense if this were not the case.

Further affiant sayeth not.

S/ Randolph Walther

Subscribed and sworn to before me a notary public this 19th day of February, 1979.

S/ Ginger Lauchiette
Notary Public, who resides in Vanderburgh County, IN

My Commission expires:

February 9, 1980

STATE OF INDIANA)
) SS: **AFFIDAVIT**
COUNTY OF VANDERBURGH)

Kenneth Skaggs, being duly sworn upon his oath, deposes and says as follows:

1. I am Secretary-Treasurer of Chauffeurs, Teamsters and Helpers Local Union No. 215, and I make this affidavit in support of Plaintiff's petition.

2. Exhibit A attached to the petition filed in this case contains job classifications in Article VIII. The work set forth in those classifications is the work of the Teamsters and has been recognized as such by defendants. One of the job classifications in the agreement reads as follows:

> Drivers of Pickup Trucks when hauling equipment, supplies and materials to, from and on the job site, except when used by a superintendent or a foreman for his own transportation or for the use of a mechanic for the transportation of himself, his tools and repair parts.

3. Article VIII of the Agreement, at Section 3, provides as follows:

> The Employer agrees to respect the jurisdiction of the Union and shall not direct or require employees or persons other than those listed in Article VIII, Section 1, to perform work which is recognized as the work of the employees in said unit. It is agreed that the provisions of this Article shall be applied in compliance with existing laws.

4. Article VI of the Agreement, at Section 22, provides as follows:

> The Employer agrees to the jurisdiction of work assigned and/or generally covered by the Teamsters (Local 215) in this geographical area.

5. The Evansville Contractors Association and its members have resolved similar grievances in the past, under the present agreement, in favor of the grievant.

Further affiant sayeth not.

S/ Kenneth Skaggs

Before me, the undersigned, a Notary Public for the County of Vanderburgh, State of Indiana, personally appeared KENNETH SKAGGS, and he being first duly sworn by me upon his oath, says that the facts alleged in the foregoing instrument are true.

Signed and sealed this 21st day of February, 1979.

S/ Pauline A. Barnard
Notary Public
Reside in Vanderburgh Co.

My Commission expires July 12, 1980 -

APR 14 198
ALEXANDER L. STE
CLERK

No. 80-1385

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

INDUSTRIAL CONTRACTORS, INC., MUNICIPAL ENGINEERING AND CONSTRUCTION CORP., and EVANSVILLE CONTRACTORS ASSOCIATION, INC.,

Petitioners,

v.

CHAUFFEURS, TEAMSTERS AND HELPERS LOCAL UNION, NO. 215 a/w INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION

Of Counsel:

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QUESTION PRESENTED

Respondent does not agree with the question presented as stated by Petitioners. The only question presented in the instant case is:

Where a collective bargaining agreement provides for the arbitration of any controversy with respect to its interpretation, application or enforcement, and makes explicit reference to work jurisdiction, did the Courts below properly conclude that Respondent's work assignment grievances were arbitrable?

TABLE OF CONTENTS

	Page
Question Presented	i
Authorities Cited	iii
Opinions Below	1
Jurisdiction	1
Statutes Involved	2
Statement of the Case	2
Reasons for Denying the Writ	4
The Court Of Appeals Applied The Legal Standards Enunciated By This Court, And The Decision Below Raises No Important Question Of Federal Law	4
Conclusion	6

AUTHORITIES CITED

Cases

Carey v. Westinghouse Electric Corp., 375 U.S. 261 (1964)	6
Gateway Coal Co. v. United Mine Workers, 414 U.S. 363, 377-378 (1974)	4
John Wiley & Sons v. Livingston, 376 U.S. 543 (1964)	4
Nolde Brothers, Inc. v. Local No. 358, Bakery & Confectionery Workers Union, AFL-CIO, 430 U.S. 243, 254-255 (1977)	4

PREVIOUS PAGE WAS BLANK

United Steelworkers of America v. American Manufacturing Co., 363 U.S. 564, 567-568 (1960) 4,5

United Steelworkers of America v. Warrior Gulf & Navigation Co., 363 U.S. 574, 585 (1960) 5

Statutes

28 U.S.C. § 1254(1) 1

§ 203(d), 29 U.S.C. § 173(d) 2

§ 301, 29 U.S.C. § 185 2

Miscellaneous

Elkouri & Elkouri, How Arbitration Works, (3rd ed.), pp. 511-516..... 6

No. 80-1385

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

INDUSTRIAL CONTRACTORS, INC., MUNICIPAL ENGINEERING AND CONSTRUCTION CORP., and EVANSVILLE CONTRACTORS ASSOCIATION, INC.,

Petitioners,

v.

CHAUFFEURS, TEAMSTERS AND HELPERS LOCAL UNION, NO. 215 a/w INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION

OPINIONS BELOW

The Opinion and Judgment of the United States Court of Appeals for the Seventh Circuit is not officially reported (Pet. App. 1A-7A). The decision and judgment of the United States District Court for the Southern District of Indiana in this case is also not officially reported (Pet. App. 8A-14A).

JURISDICTION

The judgment of the Court of Appeals was entered on November 22, 1980. The jurisdiction of this Court rests upon 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The relevant portions of the Labor Management Relations Act, as amended, are § 301, 29 U.S.C. § 185 and § 203(d), 29 U.S.C. § 173(d). Section 301 is set forth in the Petition at page 4. Section 203(d) reads as follows:

> "Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement."

STATEMENT OF THE CASE

The Petitioners, Industrial Contractors, Inc., Municipal Engineering and Construction Corp. and Evansville Contractors Association, Inc. (hereinafter referred to as the "Employers") are parties to a labor agreement with Teamsters Local Union No. 215 (hereinafter referred to as the "Union"). The labor agreement provides for final and binding arbitration of disputes which are not resolved at earlier steps of the grievance procedures. With respect to matters which are subject to the grievance-arbitration procedure, the labor agreement provides that:

> If any controversy, dispute or grievance arises with respect to the interpretation, application or enforcement of any of the provisions of this Agreement, the same shall be submitted [to the grievance procedure]." (Pet. App. 2A).

In September, 1978, the Union filed four grievances; each grievance alleged that the Employers had violated the labor agreement by assigning bargaining unit work to persons not in the bargaining unit represented by the Union (Pet. App. 15A-22A). On the subject of work assignments, the labor agreement provides:

"Article VIII, Section 1:

... Drivers of Pickup Trucks when hauling equipment, supplies and materials to, from and on the job site, except when used by a superintendent or a foreman for his own transportation or for the use of a mechanic for the transportation of himself, his tools and repair parts.

* * *

Article VIII, Section 3:

The Employer agrees to respect the jurisdiction of the Union and shall not direct or require employees or persons other than those listed in Article VIII, Section 1, to perform work which is recognized as the work of the employees in said unit. It is agreed that the provisions of this Article shall be applied in compliance with existing laws.

* * *

Article VI, Section 22:

The Employer agrees to the jurisdiction of work assigned and/or generally covered by the Teamsters (Local 215) in this geographical area." (Pet. App. 2A-3A).

When the Employers refused to arbitrate the four work assignment grievances, the Union petitioned the District Court for an order compelling arbitration. The District Court held that the agreement to arbitrate any controversy with respect to the interpretation of the labor agreement included the four work assignment grievances (Pet. App. 8A-14A). The Court of Appeals held that the grievances were arbitrable and affirmed the judgement of the District Court (Pet. App. 1A-7A).

REASONS FOR DENYING THE WRIT

The Court Of Appeals Applied The Legal Standards Enunciated By This Court, And The Decision Below Raises No Important Question Of Federal Law.

It is undisputed that the Employers and the Union entered into a labor agreement which provides for final and binding arbitration. The Employers claim only that the subject matter of certain grievances—work assignments—is excluded from the grievance-arbitration procedure. However, the Court has clearly and repeatedly stated the legal standards applicable to disputes involving the substantive arbitrability of grievances arising under a labor agreement. The Court of Appeals simply and correctly applied these standards in the instant case.

The presumptive arbitrability of grievances alleging the violation of a labor agreement has been settled law since the *Steelworkers Trilogy*. In *United Steelworkers* v. *American Mfg. Co.*, 363 U.S. 564, 567-568 (1960), the Court held that where the parties have agreed to submit all questions of contract interpretation to the arbitrator, a court "is confined to ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract." Whether the moving party is right or wrong is a question for the arbitrator.

Since *United Steelworkers* v. *American Mfg. Co.*, the Court has reiterated and strengthened the presumption favoring the arbitrability of grievances under a labor agreement. Thus, in *Gateway Coal Co.* v. *United Mine Workers,* 414 U.S. 368, 377-378 (1974), the Court again noted that labor arbitration should be resolved in favor of the arbitrability of a grievance. See also, *John Wiley & Sons* v. *Livingston,* 376 U.S. 543 (1964). Most recently, in *Nolde Bros., Inc.* v. *Local No. 258, Bakery & Confectionery Workers Union,* 430 U.S. 243, 254-255 (1977), the Court stated that parties must be deemed to have been conscious of the federal labor policy favoring arbitration when they agreed to arbitrate differences arising under the labor agree-

ment. Consequently, the failure to expressly exclude a subject from arbitration affords a strong basis for concluding that the parties intended to arbitrate such disputes.

The labor agreement in the instant case contains no such express exclusion of work assignment disputes from arbitration. Rather, the arbitration clause covers any "controversy, dispute or grievance. . .with respect to the interpretation, application or enforcement of any of the provisions of this Agreement." The four grievances all concern work assignments, a subject covered by specific provisions of the labor agreement. Since these claims are on their face governed by the labor agreement and are not specifically excluded from arbitration, the Court's decisions mandated a holding that the grievances were arbitrable.

As noted by the Court of Appeals, Petitioners' arguments concerning past practice and bargaining history pertain to the merits of the dispute. The Court has specifically forbidden such back-door attempts to have courts consider the merits of grievances under the guise of determining arbitrability. *United Steelworkers* v. *American Mfg. Co., supra* at 568. The Court has warned the lower federal courts to

> "... view with suspicion an attempt to persuade it to become entangled in the construction of the substantial provisions of a labor agreement even through the back door of interpretation of the arbitration clause, when the alternative is to use the services of an arbitrator." *United Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 585 (1960).

In this case, the court below heeded the Court's admonition and properly limited its inquiry to whether the grievances on their face were within the scope of the arbitration clause. Petitioners' arguments concerning past practice and bargaining

history are properly addressed to the arbitrator, the parties agreed upon tribunal for resolving the merits of these disputes.[1]

CONCLUSION

For the reasons stated above, the Petition should be denied.

Respectfully submitted,

GERRY M. MILLER
788 North Jefferson Street
Milwaukee, Wisconsin 53202
(414) 271-4500

Of Counsel:

MATTHEW R. ROBBINS
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Goldberg, Previant, Uelmen,
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---

[1] Work assignment disputes such as the instant grievances are grist for arbitrator's mills. See, Elkouri & Elkouri, *How Arbitration Works,* (3d ed.), pp. 511-516. The Court has recognized the special contributions which labor arbitrators can bring to the resolution of these disputes. See, *Carey* v. *Westinghouse Electric Corp.*, 375 U.S. 261 (1964).